

TAB C

John C. McCullough

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Volume: I

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CERTIFIED ORIGINAL
LEGALINK BOSTON

Pages: 1-128

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Exhibits: 48-69

4

UNITED STATES DISTRICT COURT

5

DISTRICT OF MASSACHUSETTS

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CASAS, BENJAMIN & WHITE, LLC,

8

Plaintiff,

9

v. Case No.: 04-cv-1233-MEL

10

THE POINTE GROUP, INC., a

11

Massachusetts corporation d/b/a The Pointe

12

Group Healthcare and Senior Living, GERALD S. FREID,

13

BARRY, FREID, and KEY CORPORATE CAPITAL, INC.,

14

Defendants.

15

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16

DEPOSITION OF JOHN C. MCCULLOUGH

18

May 19, 2005

19

9:24 a.m.

20

Conn Kavanaugh Rosenthal Peisch & Ford, LLP

21

Ten Post Office Square

22

Boston, Massachusetts 02109

23

24

Reporter: Carol A. Pagliaro, CSR/RPR/RMR

John C. McCullough

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1 A P P E A R A N C E S:

2

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14 Key Corporate Capital, Inc.

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18 Boston, Massachusetts 02110

19 617-261-0100

20 Counsel for the witness and Defendants

21 The Pointe Groupe, Inc., Gerald S. Freid,

22 and Barry Freid

23

24

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I N D E X

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EXAMINATION OF:

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By Atty. Higgins

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By Atty. Worcester

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E X H I B I T S

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NO.

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48 Subpoena

20

13:13:01

10

49 12/23/03 letter from Kauffman to

13:13:01

11

McCullough

20

13:13:31

12

50 6/3/2004 e-mail from Gordon to Kauffman

27

13:13:40

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51 9/25/04 e-mail from Gordon to Sucoff and
Henken

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13:13:52

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52 9/27/04 e-mail from McCullough to Cole

41

13:13:56

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53 9/27/04 package of wiring instructions

43

13:14:19

16

54 9/29/04 e-mail from McCullough to Gordon

49

13:14:44

18

55 9/29/04 e-mail from Caine to Cole

51

13:14:52

19

56 9/27/04 draft of Closing Statement

56

13:15:00

20

57 9/30/04 8:20 a.m. Draft of Closing

13:15:00

21

Statement

65

13:15:12

22

58 9/30/04 8:37 a.m. Draft of Closing

13:15:18

23

Statement

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13:15:21

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59 9/29/04 e-mail from Sucoff to McCullough

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20 *Original exhibits retained by Atty. Higgins

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P R O C E E D I N G S

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Stipulation

3

It is stipulated by and between counsel for the
respective parties that Motions to Strike and all
objections, except as to form, are reserved until
the time of trial. It is further stipulated that
the witness may sign the deposition under the pains
and penalties of perjury, rather than before a
notary public.

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13

JOHN C. McCULLOUGH,

a witness called on behalf of the Plaintiff, having
first been duly sworn, was deposed and testified as
follows:

14

DIRECT EXAMINATION

15

BY ATTY. HIGGINS:

09:24:57 16

Q. Sir, could you state your full name for the
record?

09:24:59 18

A. Yes, John McCullough, M-c-C-u-1-1-o-u-g-h.

09:25:05 19

ATTY. HIGGINS: Mr. McCullough, I
represent the plaintiff in this, casas, Benjamin &
white. Have you ever had your deposition taken
before?

09:25:14 23

A. I can't recall if I have.

09:25:16 24

Q. I know you are a transactional lawyer,

5

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09:25:19 1 correct?

09:25:20 2 A. Yes.

09:25:21 3 Q. Have you ever sat in on deposition?

09:25:21 4 A. Yes.

09:25:23 5 Q. So you are generally aware of the rules, but

09:25:25 6 I'll just tell you a few that sometimes it's hard

09:25:28 7 for people who are actually giving depositions to

09:25:32 8 remember. Most important is you need to let me

09:25:34 9 finish my question before you start answering, even

09:25:37 10 though, like most attorneys, you are going to think

09:25:39 11 you know what my question is, so the court reporter

09:25:41 12 can take down my question and your answer without us

09:25:44 13 talking over one another.

09:25:45 14 If you don't understand a question I'm

09:25:47 15 asking you, please let me know, and I'll try too

09:25:49 16 rephrase it.

09:25:50 17 If you need to take a break, let me

09:25:52 18 know. We can do that as long as it's not in the

09:25:55 19 middle of a pending question.

09:25:57 20 And that's about it.

09:25:59 21 Are you taking any medications today

09:26:01 22 that would affect your ability to answer my

09:26:04 23 questions?

09:26:05 24 A. No.

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09:26:06 1 Q. I'm not going to go through a huge litany,
09:26:10 2 but could you just briefly tell me your educational
09:26:12 3 background and where you have worked in the last 20
09:26:14 4 year?
09:26:15 5 A. I went to law school.
09:26:16 6 Q. Where did you go to law school?
09:26:17 7 A. BC Law.
09:26:17 8 Q. When did you graduate?
09:26:19 9 A. 1966.
09:26:22 10 Q. And where have you worked during the past
09:26:25 11 ten years.
09:26:26 12 A. McCullough, Stievater & Polvere, 121 Main
09:26:31 13 Street, Charlestown.
09:26:31 14 Q. And that's a firm you founded?
09:26:33 15 A. Yes.
09:26:34 16 Q. What year did you found the firm?
09:26:36 17 A. 1972.
09:26:37 18 Q. And you have worked there ever since?
09:26:39 19 A. Yes.
09:26:40 20 Q. Can you just describe for me generally your
09:26:42 21 areas of practice?
09:26:44 22 A. Currently the areas of practice are project
09:26:47 23 developments, affordable housing, extensive nursing
09:26:51 24 home representation, management, sales, HUD closing,

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11:22:08 1 outside of closing. It's a typical standard
11:22:08 2 reference.

11:22:08 3 Q. What was Andy Sucoff's response to that?

11:22:09 4 A. He didn't have any response. I just said we
11:22:11 5 are going to deal with it outside of closing, and he
11:22:13 6 adjusted the -- he would make the adjustment he
11:22:17 7 said. we were going over many other issues at the
11:22:22 8 same time.

11:22:22 9 Q. And before you told Mr. Sucoff that -- well,
11:22:27 10 let me ask this question, when you told Mr. Sucoff
11:22:30 11 that we would deal with the broker commission out of
11:22:33 12 the closing, who were you referring to?

11:22:35 13 A. The sellers.

11:23:10 14 (Court Reporter changes paper.)

11:23:18 15 Q. Before you told Mr. Sucoff that the sellers
11:23:22 16 would deal with the broker commission outside of the
11:23:24 17 closing, did you have any conversations with anyone
11:23:27 18 at Casas, Benjamin & White as to whether that was
11:23:30 19 acceptable to Casas, Benjamin & White?

11:23:32 20 A. I did not.

11:23:33 21 Q. Did anyone tell you that they had had such a
11:23:36 22 conversation with anyone at Casas, Benjamin & White?

11:23:44 23 A. I don't recall if anybody told me that.

11:23:48 24 Q. Prior to telling Mr. Sucoff that the sellers

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11:23:51 1 would deal with the broker commission outside of the
11:23:54 2 closing, had you, without revealing the substance of
11:23:58 3 any communications, had you spoken with anyone
11:24:03 4 affiliated with the sellers about that issue?

11:24:03 5 ATTY. GORDON: Just yes or no.

11:24:14 6 A. Yes.

11:24:15 7 Q. And, again, without revealing the substance
11:24:17 8 of any such communications, before telling Mr.
11:24:22 9 Sucoff that the sellers would deal with the broker
11:24:25 10 commission outside of the closing, had you discussed
11:24:28 11 that issue with Barry Freid?

11:24:30 12 ATTY. GORDON: I'm going to instruct the
11:24:32 13 witness not to answer that question.

11:24:34 14 ATTY. HIGGINS: It's a yes-or-no
11:24:34 15 question.

11:24:34 16 ATTY. GORDON: I understand that. I'm
11:24:35 17 going to instruct him not to answer the question.

11:24:39 18 ATTY. HIGGINS: And on what, just to
11:24:39 19 make sure for the record?

11:24:40 20 ATTY. GORDON: On the grounds of
11:24:41 21 privilege.

11:24:42 22 Q. All right, I'm going to ask a similar
11:24:44 23 question. Prior to telling Mr. Sucoff that the
11:24:50 24 sellers would deal with the broker's commission

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11:24:53 1 outside of the closing, again without revealing the
11:24:56 2 substance of any communications, had you discussed
11:25:01 3 that issue with Gerald Freid?

11:25:03 4 ATTY. GORDON: I'm going to instruct the
11:25:03 5 witness not to answer the question on the grounds
11:25:06 6 of privilege.

11:25:07 7 ATTY. HIGGINS: I'll object to that
11:25:08 8 instruction.

11:25:12 9 Q. Mr. McCullough, prior to telling Mr. Sucoff
11:25:14 10 that you would deal with the broker commission
11:25:18 11 outside of the closing, had you discussed that issue
11:25:22 12 with Mark Tobin?

11:25:23 13 ATTY. GORDON: I'm going to instruct the
11:25:24 14 witness not to answer that question on the grounds
11:25:27 15 of privilege.

11:25:31 16 Q. Had you discussed the issue -- let me start
11:25:34 17 again. Prior to telling Mr. Sucoff that the sellers
11:25:38 18 would deal with the broker commission outside of the
11:25:41 19 closing, had you discussed that issue with Mr.
11:25:43 20 Gordon?

11:25:44 21 ATTY. GORDON: I'm going to instruct the
11:25:46 22 witness not to answer that question on the grounds
11:25:47 23 of privilege.

11:25:50 24 Q. Mr. McCullough, had you discussed that

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11:25:52 1 issue, the issue that I have just been talking
11:25:54 2 about? Had you discussed that issue, again without
11:25:57 3 telling me the substance of such communications,
11:26:00 4 with Georgia Freid?

11:26:01 5 ATTY. GORDON: I'm going to instruct the
11:26:02 6 witness not to answer the question on the grounds of
11:26:05 7 privilege.

11:26:26 8 Q. Let me just try it a slightly different way.
11:26:31 9 Mr. McCullough, prior to telling Mr. Sucoff that the
11:26:36 10 sellers would deal with the broker commission
11:26:38 11 outside of the closing, had anyone affiliated with
11:26:41 12 The Pointe Group authorized you to make that
11:26:45 13 communication to Mr. Sucoff?

11:26:47 14 ATTY. GORDON: I'm going to instruct the
11:26:48 15 witness not to answer that question on the grounds
11:26:52 16 of privilege.

11:26:54 17 ATTY. HIGGINS: Even though my question
11:26:55 18 regards a communication that was to be made to a
11:26:59 19 third party?

11:27:01 20 ATTY. GORDON: My instruction stands.

11:27:01 21 ATTY. WORCESTER: Could you read back
11:27:33 22 Erin's last question.

11:27:33 23 (Question read.)

11:27:45 24 ATTY. HIGGINS: Let's go off the record

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11:28:51 1 for a second. 75

11:28:51 2 (Discussion off the record.)

11:28:53 3 ATTY. HIGGINS: I just want the record

11:28:55 4 to reflect that while we were off the record counsel

11:28:58 5 discussed whether to suspend Mr. McCullough's

11:29:01 6 deposition now for the purpose of obtaining the

11:29:04 7 judge's ruling on whether Mr. McCullough should be

11:29:07 8 required to answer questions, the questions that I

11:29:10 9 just posed to Mr. McCullough, whether we would

11:29:14 10 suspend his deposition at the end of today, then

11:29:19 11 seek the judge's ruling on whether he should be

11:29:21 12 required to answer those questions, which might

11:29:24 13 entail Mr. McCullough coming back for a subsequent

11:29:27 14 deposition to answer questions as the judge directs,

11:29:31 15 and I just want to make it clear for the record that

11:29:33 16 I'm reserving my right to do that.

11:29:35 17 ATTY. GORDON: And we have agreed to do

11:29:36 18 that.

11:29:46 19 Q. Getting back to the closing itself, do you

11:29:49 20 recall who was present at Goodwin's offices that day

11:29:54 21 from The Pointe Group side of things?

11:30:03 22 A. Yes, there were a number of people, Mark

11:30:07 23 Tobin, Jerry Freid, Barry Freid, Steve Gordon, Frank

11:30:13 24 Barker, Mary Anne Tyler, Mary Cole, myself, and